

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Valley Slurry Seal Co.

Case No. 06-0136-PWH

From a Notice of Withholding issued by:

California Department of Transportation

DECISION OF THE DIRECTOR

Affected contractor Valley Slurry Seal Company ("VSS") submitted a timely request for review of a Notice of Withholding issued by the California Department of Transportation ("Caltrans") with respect to work performed by VSS for the application of a slurry seal coating and to existing pavement in various locations within Plumas County ("the Project"). A Hearing on the Merits was conducted on December 8, 2006, in Sacramento, California before Hearing Officer Nathan D. Schmidt. Jeffrey R. Reed and Alan S. Berger appeared for VSS, and Angela Shell appeared for Caltrans. For the reasons set forth below, the Director of Industrial Relations issues this decision dismissing the Notice of Withholding in full.

SUMMARY OF FACTS

Following an investigation by Caltrans' Labor Compliance Program, Caltrans submitted a request to the Labor Commissioner for approval of forfeitures in the amount of \$1,783.68 on June 8, 2006, seeking unpaid wages, but assessing no penalties. Caltrans subsequently issued a Notice of Withholding of Contract Payments on the project on July 12, 2006. VSS filed a Request for Review of the Notice of Withholding of Contract Payments on July 24, 2006.

The primary issue in this case is whether one VSS worker, Stephen Reynolds, should have been classified as an Operating Engineer, Group 4, Loader Operator, rather than as a Slurry Seal Worker for hours that he purportedly operated a 926 Loader ("loader") to load aggregate material into slurry seal machines. VSS contends that loader operation, if any, was

incidental to Reynolds's job duties on the project and thus was within the scope of the Slurry Seal Worker, Applicator Operator classification.

Kurt Schneider, one of the two inspectors on the Project, testified that the other inspector, R. Prejean, prepared a spreadsheet estimating that a loader was operated approximately five hours and forty-five minutes per day on the Project. Prejean arrived at his estimate by dividing the total amount of aggregate material delivered by an estimated eight ton capacity for each slurry seal machine and the 14 days of work on the Project to arrive at an estimated 32.69 loads per day. Based on this number, Prejean concluded that slurry seal machines were being operated an average of 326.89 minutes per day and, without any further calculation apparent on the face of the spreadsheet, asserts that the loader was being operated the entirety of that time.¹

Schneider testified that he had observed slurry seal machines being loaded on the Project, but that he did not time how long it took to load one of the slurry seal machines or know who had operated the loader on this Project. He stated that it was his understanding that Shuttlepersons drove the slurry seal machines back and forth between the work site and the stockpile, waited in the trucks while they were loaded by an individual operating the loader with aggregate material, oil and water, and then drove the trucks back to the worksite to turn them over to a "Line Driver" who drove the truck in a straight line in the roadway while the slurry seal coating was applied.² He explained that the Line Driver would move from slurry seal machine to slurry seal machine as each was delivered by the Shuttlepersons. The Shuttlepersons would take the empty slurry seal machines back to the stockpile for reloading. Schneider testified that he did no worker interviews on the job site and did not know of any logs, diaries or time records that would indicate who had operated the loader on this Project.

Gregg Milani, Caltrans District 2 Labor Compliance Officer, testified that he had reviewed VSS' certified payroll records for the Project, Mr. Prejean's spreadsheet and the in-

¹ This breaks down to approximately ten minutes loading time per load.

² "Line Driver" is a common name used in the trade for the Slurry Seal Worker, Applicator Operator classification. While the term does not appear in the applicable Northern California Slurry Seal Worker prevailing wage determination (no. NC-830-X-69-2000-1), the term is listed as synonymous with Slurry Seal Applicator Operator in Classification Group 3 of the Southern California Slurry Seal Worker prevailing wage determination (no. SC-23-102-6-2004-1).

spectors' diaries. Based on that review, Mr. Milani testified that he had determined that VSS worker Reynolds had spent four hours per day operating the loader on the Project.

Reynolds testified that he was hired by VSS in May 2005 as a Line Driver and worked as a Line Driver on the Project. While working on the Project, he moved from slurry seal machine to slurry seal machine as they were brought to him by the Shuttlepersons. His job was to apply the slurry seal coating. Reynolds never loaded any material into the slurry seal machines on this job. He only operated the loader briefly at the end of each day to remove the spreader box from the back of the last slurry seal machine he had been driving so it could be cleaned. Reynolds testified that he thought a worker named Anthony may have operated the loader to load the slurry seal machines. While he did not do any loading on this Project, Reynolds testified that he had been a loader on jobs for a prior employer and that it typically took no more than three or four minutes for the six or seven scoops with the loader required to load a slurry seal machine with aggregate. Reynolds didn't know the capacity of the slurry seal machines on this Project, but said that they were larger than the ones he had driven for another employer that held 13 tons.

Guy Crowe, VSS's Superintendent of Operations on the Project, confirmed that Reynolds had been employed as a Line Driver on the Project and that in that position he would only have incidentally used the loader to remove the spreader box from the slurry seal machine for repair or cleaning. Crowe testified that the slurry seal machines used on the Project had a capacity of 15 to 18 tons of aggregate and that the three slurry seal machines used on the project combined would have carried an average total of 12 to 16 loads per day. He stated that both aggregate and oil and water must be loaded in the slurry seal machine. The entire loading process takes a total of four to seven minutes per load. Approximately two minutes of that time would be spent loading aggregate, which is all that Prejean calculated. Crowe said that the Shuttlepersons coordinated the stockpile area and that there was no specific person on the Project assigned to load the slurry seal machines. He testified that three individuals had worked in the stockpile, Jason Morgan, Anthony Ramsey and Israel Barrios, and that they would all have done loading on occasion.

The time required to load a slurry seal machine is also addressed in a letter from Alan S. Berger, Vice President of VSS, to Milani, dated October 21, 2005, contending that the

loading function should be treated as an incidental part of the duties of a Shuttleperson. Berger quotes VSS' Shuttleperson job description, which states in part:

The shuttleperson is required to load the materials, used in the slurry seal mixture, into the trucks that will ultimately lay the slurry seal mixture on the roadway. This involves utilizing a loader to load the trucks with aggregate, pumps to load emulsion from an onsite storage tanker, pumps to load additives, and also to fill the truck with water. Total loading of all materials takes less than 10 minutes, and the actual loading of aggregate takes less than 5 minutes. This process will be repeated 15-20 times per day.

The text of Berger's letter is virtually identical to one he sent to Caltrans regarding an earlier project on December 23, 2004. Both letters were introduced into evidence by Caltrans.

VSS contends that Reynolds' testimony establishes that he never operated a loader to fill slurry seal machines with aggregate on this job, but rather was employed as a Line Driver applying slurry seal coating at the work site. Therefore he was properly paid within the Slurry Seal Worker, Applicator Operator classification.

Caltrans argues that, although Mr. Reynolds and Mr. Crowe testified that Mr. Reynolds did not operate the loader to load aggregate material into the slurry seal machines, they admit that someone did and thus cannot say with certainty that Mr. Reynolds did not perform that work. Even if Mr. Reynolds was not the individual loading materials into the slurry seal machines with the loader, another VSS employee was and that employee is entitled to receive the correct prevailing wage for that function.

DISCUSSION

Labor Code sections 1720³ and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security

³ All further unspecified sections refer to the Labor Code.

and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [citations omitted].) An Awarding Body with a Labor Compliance Program like Caltrans enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Labor Code, § 90.5(a), and see *Lusardi, supra*.)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a notice of withholding under section 1741.

When Caltrans determines that a violation of the prevailing wage laws has occurred, a Notice of Withholding of Contract Payments is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Notice by filing a Request for Review under Labor Code section 1742. Subdivision (b) of section 1742 provides in part that the contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect.

VSS Was Not Required To Pay The Prevailing Rate For Operating Engineers For Work Performed By Stephen Reynolds Because Caltrans Has Not Established That He Performed Such Work.

In its Notice of Withholding, Caltrans alleges that Reynolds worked four hours of each workday using a loader to load aggregate material into slurry seal machines and that he should therefore have been paid a higher prevailing wage under the Operating Engineer classification for that work. Caltrans has provided only estimates of how much time was spent loading slurry seal machines on the project, however, and has submitted neither documentary evidence nor testimony to establish who actually did the loading. With regard to the time spent loading, the sole evidence proffered by Caltrans is the spreadsheet prepared by Prejean.

Reynolds compellingly testified, however, that he did not do any loading of aggregate

material on this Project. Rather, Mr. Reynolds testified that he had driven slurry seal machines that were brought to him preloaded for the entire work day, using a loader only briefly at the end of each day for the sole purpose of lifting the spreader box from the rear of the last slurry seal machine he had driven for cleaning.

Further, both Reynolds and Crowe, testified in detail regarding the size of each load and the amount of time required to load the slurry seal machines based on their personal knowledge. Both witnesses contradicted the eight ton load capacity used in Prejean's calculations, with Reynolds testifying that the slurry seal machines used on the project held over 13 tons and Crowe testifying that their capacity was between 15 and 18 tons. Revising Prejean's calculations using the higher capacity per load testified to by Crowe, approximately double the eight tons per load used in the spreadsheet, the number of slurry seal machine loads per day are cut in half to approximately 16. This number is in line with Crowe's testimony of an average of 12 to 16 loads per day on the Project.

Using the estimate of 10 minutes loading time per load from Prejean's spreadsheet, the total loading time per day for 16 slurry seal machine loads would be 160 minutes or approximately two and two-thirds hours. Crowe's and Reynolds's testimony, as well as VSS' Shuttleperson job description, give a range of four to ten minutes loading time per slurry seal machine load and a range of two to five minutes per load to load the aggregate. Even with the highest estimate of ten minutes loading time, and using the highest estimate of five minutes per load to load aggregate from VSS' job description, the total loading time required to load aggregate for 16 slurry seal machine loads would be 80 minutes per day, far less than the four hours alleged by Caltrans in the Notice of Withholding. If the three workers identified by Crowe as working in the stockpile divided this work evenly, it would break down to a daily average of slightly under 27 minutes of loader operation per worker.

While there is no dispute that loading was done on the project, the weight of the evidence establishes that the total time spent loading slurry seal machines was far less than the four hours per day alleged by Caltrans and that the loading was divided among at least three workers. In the Notice of Withholding, however, Caltrans contends that all of the loading was done by Reynolds, which is clearly wrong. In the absence of credible evidence establishing that Reynolds or anyone else employed by VSS was misclassified, VSS has satisfied its bur-

den of establishing that the basis for the Notice of Withholding is incorrect.

All Other Issues Are Moot

In light of the determination above, all other issues are moot and need not be decided.

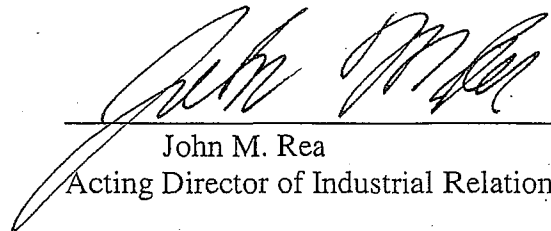
FINDINGS

1. Stephen Reynolds was employed by VSS as an Applicator Operator or "Line Driver" on the Project driving slurry seal machines full time to apply slurry seal coating at the work site. In that capacity, he operated a loader very briefly at the end of the workday to remove the spreader box from the slurry seal machine for cleaning.
2. Mr. Reynolds was paid the proper prevailing wage for his work on the project under the Slurry Seal Worker, Applicator Operator Classification.
3. All other issues are moot.

ORDER

The Notice of Withholding is dismissed. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 11 May 07



John M. Rea
Acting Director of Industrial Relations